84-675

No.

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner

v.

JUNE T. PERRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Eleventh Circuit Court of Appeals

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QUESTIONS PRESENTED

1. Whether a district judge may keep from the jury evidence of fraudulent insurance claims misrepresentations of the type condemned in this Court's seminal case of *Claflin v. Commonwealth Insurance Company*, 110 U.S. 81 (1884) decision and all of the American law of insurance since that time.

2. Whether a district judge may arbitrarily prohibit the testimony of a representative of the Social Security Administration on the single question of the date of cessation of June Perry's Social Security benefits, critical to an insurance arson defense, by a "policy" made in advance of Petitioner's motion for such testimony, and without the required blancing of the need for that testimony against possible harmful effects of the testimony on June Perry.

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OPINIONS BELOW

The only written opinion in this case was issued by the Eleventh Circuit Court of Appeals and is cited as *Perry v. State Farm Fire and Casualty Co.*, 734 F.2d 1441 (11th Cir. 1984). (Appendix A)

JURISDICTION

Jurisdiction lies with the Supreme Court in this case pursuant to 28 U.S.C.A. § 1254(1)(1966). The Court of Appeals opinion from which Petitioner seeks review in this Court was entered on June 22, 1984. Petitioner's request for rehearing and en banc consideration to the Court of Appeals was denied on July 30, 1984. (Appendix B)

STATUTE INVOLVED

5 U.S.C.A. § 552a(b)(11) (1977 & Supp. 1984) provides as follows:

> **(b) Conditions of disclosure.**—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> (11) pursuant to the order of a court of competent jurisdiction.

STATEMENT OF THE CASE

This action was filed in the Superior Court of Clarke County, Georgia, and was removed to the United States District Court for the Middle District of Georgia, Athens Division by defendant/petitioner, State Farm Fire and Casualty Company ("State Farm"). The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1332 (a) (Supp. 1984).

June T. Perry and Jimmy Perry were the owners of a house at Route 2, Carnesville, Georgia, which was insured under a State Farm homeowners policy. On January 30, 1982, the insured house and contents were destroyed by fire and the Perrys made claim to State Farm under the policy for the entire amounts of the dwelling and contents coverages.

As part of State Farm's investigation, a recorded statement was taken from June Perry on March 5, 1982. On March 12, 1982, June Perry submitted her sworn statement in proof of loss to State Farm. State Farm then took her examination under oath, as provided in the policy. At the completion of its investigation, State Farm denied June Perry's claim. State Farm's investigation indicated that the fire was started either by or for June Perry. State Farm also alleged that Mrs. Perry's policy was void as a result of her having intentionally concealed or misrepresented material facts and circumstances related to the claim.[1]

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[1] State Farm's investigation revealed that June Perry's ex-husband, Jimmy Perry, was not involved in the arson or any subsequent fraud, and paid him his one-half claim. State Farm also paid the interest of the mortgagee named on the policy.

June Perry sued to collect her share of the insurance proceeds. The policy sued upon provides:

> 19. *Concealment or Fraud.* We do not provide coverage for any insured who has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance.

At trial, State Farm attempted to prove numerous misrepresentations committed by June Perry both to show that she had violated the concealment or fraud clause of the policy, voiding the policy, and also to substantiate its arson defense. These misrepresentations included, among others:

a. that June Perry lied about whether she had ever received a notice of foreclosure on the insured dwelling before the fire;

b. that June Perry lied about the condition of her house at the time of the fire, in that she claimed that it was in perfect condition, when the evidence, including her own admissions *in judicio*, clearly showed that it was in extreme disrepair;

c. that June Perry lied concerning her knowledge of the termination of her social security benefits, her sole income, before the fire;

d. that June Perry lied about her ability to refinance the house at the time of the fire in that she stated that she could and the evidence showed that she could not; and

e. that June Perry lied by saying that she had a firm offer to buy the house at the time of

the fire when the evidence clearly showed that she did not.

At trial, the District Court ruled as a matter of law that none of these misrepresentations could be submitted to the jury. The court implicitly ruled that whatever misrepresentations had occurred were not material based on the court's opinion of the evidence.

The Eleventh Circuit Court of Appeals affirmed the District Court decision, stating that these misrepresentations were not material as a matter of law. It did so partly by refusing to mention material evidence pointedly put to that court in briefs and Motion for Rehearing, contrary to its holding.[2] The Court of Appeals also ruled that any effect that keeping this evidence from the jury might have had on the arson defense was harmless.

The District Court denied a motion by State Farm to allow it to present testimony from a representative of the Social Security Administration as to the date on which June Perry's social security benefits were to be cut off. The court said that it had a "policy" against allowing said testimony. The Court of Appeals ruled that the District Court's refusal to allow this testimony was not error.

State Farm now Petitions this Court for a Writ of Certiorari to the Eleventh Circuit Court of Appeals to review this opinion.

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[2] For instance, the Court of Appeals held that Mrs. Perry's misrepresentations as to "minor repairs" could not have been material, never mentioning that the record showed that she had earlier admitted *in judicio* that the house had become so misaligned and dilapidated that no doors would close nor windows open.

ARGUMENT

I. The holding below effectively destroys an insurer's material misrepresentation defense, disregards this court's *Claflin v. Commonwealth Insurance Company* decision, and invites insurance fraud.

The *Perry* decision, through its near destruction of the misrepresentation defense, has prevented an insurer from carrying out its Congressional mandate to resist insurance fraud, especially fraud related to arson. The United States Congress has acknowledged that arson and fraud have become one of the nation's fastest growing crimes and a national plague. S. REP. No. 96-535, 96th Cong., 1st Sess. 1 (1979). In a report of the Committee of Governmental Affairs, the United States Senate formally pointed the finger at the insurance industry as contributing to the high incidence of arson and the related fraud. The committee stated:

> Claims inspection practices help make it easy to get away with fraud. Insurers rarely challenge suspicious claims, permitting arson profiteers to operate with relative freedom . . . . The insurance industry must share some of the blame for the arson problem. The subcommittee believes that the companies have, on the whole, not shown enough diligence in pre-coverage inspection of properties and in loss adjustments.

S. REP. No. 96-535, 96th Cong., 1st Sess. 62, 63 (1979).

The District Court did not allow the jury to hear any evidence on the majority of the misrepresentations made by June Perry during the investigation of her

claim conducted by State Farm. It made *a priori* determinations that the evidence concerning the misrepresentations was not material.[3] The District Court resolved all factual conflicts in the profferred testimony, and evaluated the reasons offered for Mrs. Perry's false statements at a bench conference, without ever having heard the evidence, or allowing it to be presented. This action was ratified by the Eleventh Circuit Court of Appeals, which evaluated the facts further and supplied justifications for Mrs. Perry's actions which were never before the District Court. It did so, in part, by misstating the evidence.

The District Court and the Court of Appeals thus usurped the primary and traditional role of the jury: to evaluate conflicts in the evidence and to weigh the significance of the evidence. The further, and more disturbing effect of this usurpation is to endanger the viability of the misrepresentation defense in the Eleventh Circuit. Without the confidence that its claim of fraud will be heard, an insurer cannot carry out its Congressional mandate.

The standard for the materiality of misrepresentations which governed the Eleventh Circuit, by that court's own admission, was simply whether the misrepresentations *might* affect an insurer's actions in regard to settlement or adjustment of the claim of the insured. *Perry v. State Farm Fire and Casualty Co.*, 734 F.2d 1441, 1443 (11th Cir. 1984). The materiality of the misrepresentations committed by Mrs. Perry were of the calibre that would justify a summary judgment in favor of the insurer. *See Long v. Insurance Com-*

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[3] At one point, the District Court referred to State Farm's misrepresentation defense as "nitpicking".

pany of North America, 670 F.2d 930 (10th Cir. 1982). In *Perry*, the District Court would not even let the jury consider whether the information given by Mrs. Perry, and acknowledged to be untrue, could have affected the insurer's investigation. Had the company simply taken the word of the insured, it never would have known that her house was going to be foreclosed upon, that the house was in unsalable condition, that her only source of income was to be cut off before the fire, that she could not re-finance her debt and that there were no firm offers to buy the house. In that case, the course of the investigation would literally have been side-tracked and the truth never would have been known. State Farm would have simply paid the claim and thus ignored the Congressional mandate placed upon it to fight insurance fraud. The Court of Appeals' sanction of this dilution of the materiality standard has all but destroyed an insurer's ability to resist fraudulent claims in this Circuit. The practical effect of this decision is to allow a District Court to ignore acknowledged misrepresentations and to severely limit an insurer's ability to have this defense considered by a jury.

This decision is significant and merits this Court's attention on the further ground of its gross deviation from the law set down in *Claflin v. Commonwealth Insurance Company*, 110 U.S. 81 (1884). There, one hundred years ago, this Court specifically recognized that an insured has a duty of utmost good faith in dealing with his insurer, holding:

> The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to

> possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured. A false answer as to any matter of fact material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and willfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts.

110 U.S. at 94-95.

Claflin recognized that the insurer, as a practical matter, must depend on the insured for substantive information about the loss and any surrounding circumstances. This Court, through *Claflin*, specifically endorsed the voiding of an insurance policy when the insured lied in answering material questions put to him by his insurer. *Claflin* at 94-97. The decision in *Perry*, rather than enforcing the good faith dealing requirement of *Claflin*, permits an insured to lie to an insurer with impunity.

The principle of the *Claflin* decision, that an insurance company's fact-finding process is vital to

proper investigation of a claim, is the basis for the material misrepresentation defense which has now been emasculated by the District Court and the Court of Appeals in this case. Throughout the country, *Claflin* has been the cornerstone for courts' recognition that willful misrepresentation is a defense to fraudulent claims. It articulated the standard upon which all of the law of insurance fraud in this country has become founded.[4] The *Perry* decision has now taken an entire federal circuit from this body of law and has opened a wide door for insurance fraud.

The *Perry* decision stands as a roadblock to an insurer's ability to carry out its mandate. If an insurer is to defend itself (and thereby the public) against insurance fraud, thus carrying out Congress's mandate, an insurer must be able to assert its defense effectively in court. The *Perry* decision has removed one of an insurer's principal tools for resisting arson-related insurance fraud: the ability to demand good faith dealing from the insured and enforce this by voiding the policy. If the result below is allowed to stand, it will be the practical end of the misrepresentation defense in the Eleventh Circuit. This is contrary to the direction the law has taken from *Claflin v. Commonwealth In-*

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[4] See e.g., *Nonantum Investment Co. v. Maryland Casualty Co.*, 56 F.2d 329 (1st Cir. 1932); *Fine v. Bellefonte Underwriters Ins. Co.*, 725 F.2d 179 (2nd Cir. 1984), *cert. denied*, 53 U.S.L.W. 3222 (Oct. 2, 1984); *State Farm Fire and Casualty Co. v. Herron*, 269 F.2d 421 (4th Cir. 1959); *Chaachou v. American Central Ins. Co.*, 241 F.2d 889 (5th Cir. 1957); *Edwards v. U. S.*, 140 F.2d 526 (6th Cir. 1944); *Esquire Restaurant, Inc. v. Commonwealth Ins. Co.*, 393 F.2d 111 (7th Cir. 1968); *Duke v. Hartford Ins. Co.*, 617 F.2d 509 (8th Cir. 1980); and *Long v. Insurance Company of North America*, 670 F.2d 930 (10th Cir. 1982).

surance Company, supra, and frustrates the Congressional mandate given to the insurance industry to resist fraudulent claims. *Perry* virtually nullifies the effect of the Concealment or Fraud provision.

II. The District Court arbitrarily barred testimony by a Social Security Administration representative.

Having discovered during its investigation that June Perry's Social Security benefits were to have been terminated in December, 1981, State Farm attempted to prove that fact at trial by the testimony of a representative of the Social Security Administration. The fact that Mrs. Perry's benefits, admittedly her only source of income, were to have been cut off shortly before the fire was obviously relevant to show motive to burn her house. It was also important to State Farm to show the date on which Mrs. Perry's benefits were to have been cut off, since Mrs. Perry had given several dates in statements to State Farm and in prior divorce trial testimony.

To obtain testimony from a Social Security representative as to this fact, Petitioner was required to obtain a court order, pursuant to the Privacy Act, 5 U.S.C.A. § 552a(b)(11) (1977 & Supp. 1984).

The District Court summarily denied Petitioner's Motion for an Order permitting this testimony, stating that:

> Prior to receipt of yours of November 10th and your Motion for Production of Information concerning the Plaintiff's social security applications, it has been my policy to refuse to cause such information to be produced by the Secre-

tary. Social Security was not intended to be utilized for the purposes set forth in your Motion.

The Court of Appeals held that requests for court orders of this type "should be evaluated by balancing the need for the disclosure against the potential harm to the subject of the disclosure." *Perry, supra,* at 1447.

Here, the District Court announced that it had a "policy" of not allowing testimony from Social Security representatives. This policy, which the District Court said existed "prior to" Petitioner's Motion, was a way of saying that the District Court did not conduct any balancing of the type required by the Court of Appeals, but rather denied all such motions out-of-hand.

Had the District Court balanced the factors set out by the Court of Appeals, it would necessarily have granted Petitioner's Motion. State Farm needed this lone critical fact as primary evidence of when Mrs. Perry was notified that her only source of income would stop. Mrs. Perry had already given statements (albeit false ones) as to this date. It is difficult to conceive of what harm to Mrs. Perry the disclosure of this information could have caused, or how any such allegation of harm could have outweighed State Farm's legitimate need for this one fact.

The District Judge's refusal to allow this testimony was arbitrary in the truest sense of the word: he said on paper that he had already decided not to allow such testimony, even though the Court of Appeals has said in its opinion that he was required to have evaluated the motion.[5]

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[5] The Court of Appeals suggests that the Motion could have been denied because the Petitioner did not need the testimony,

The Privacy Act was intended to prevent the disclosure of information about individuals unless there were some reason for that disclosure. It was never intended to thwart a litigant's ability to prove facts embodied in agency records at a trial, particularly where the subject of the disclosure (the cut-off of Mrs. Perry's Social Security benefits) was a disputed issue at trial, and where she had already made statements under oath on that subject.

The effect of the District Judge's arbitrary refusal to allow the testimony requested by State Farm was to enforce its "policy" at the expense of the jury's having a definite, reliable statement as to when Mrs. Perry's income was to have ceased. That result is impossible to justify, and should be overturned by this Court.

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since it could have obtained the information directly from the Plaintiff. Disregarding the fact that the primary evidence of this fact was solely in the hands of the Social Security Administration, and that Mrs. Perry had already given at least three different versions of that fact, the Court of Appeals' own standard for evaluating requests of this type requires *balancing* the need for disclosure against harm to Mrs. Perry. The Court of Appeals did not even speculate that there might have been any such harm to Mrs. Perry. Moreover, Petitioner could not have obtained this information directly from the Social Security Administration by discovery without a court order.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

June 22, 1984

JUNE T. PERRY, Plaintiff-Appellee,

v.

STATE FARM FIRE & CASUALTY COMPANY,
Defendant-Appellant.

NO. 83-8048.

Before KRAVITCH and ANDERSON*, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

In this diversity action, plaintiff June T. Perry sued State Farm Fire & Casualty Company ("State Farm") to collect under a homeowners insurance policy following the destruction, by fire, of Perry's home. A jury awarded Perry the full amount of her claim.

On appeal, State Farm contests various rulings of the district court excluding evidence from the jury's consideration. Finding no reversible error, we affirm.

I. BACKGROUND

June Perry owned a residence in Carnesville, Georgia, with her ex-husband, Jimmy Perry. The dwelling and its contents were insured under a State Farm Homeowners insurance policy for $62,655 and

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* Judge R. Lanier Anderson, III, having recused himself, did not participate in the decision of this case. The case is being decided by a quorum. 28 U.S.C. § 46(d).

$33,108.54, respectively. On January 30, 1982, fire destroyed the property, and the Perrys thereafter submitted a claim to State Farm under the policy for the full amount of the coverage. State Farm's Senior Claims Specialist, Ed Pihl, investigated the fire loss. As part of his investigation, Pihl took an unsworn statement from June Perry on March 5, 1982.

On March 12, 1982, June Perry submitted to State Farm a Sworn Statement in Proof of Loss, in which she made a formal claim for one-half the dwelling coverage and the entire contents coverage.[1] On April 26, 1982, State Farm's attorney examined June Perry under oath about her claim.

State Farm denied Mrs. Perry's claim in a letter dated June 28, 1982. The letter explained that State Farm's investigation had revealed that the fire was started by Mrs. Perry or on her behalf. The letter added that Mrs. Perry had made a number of misrepresentations, both sworn and unsworn, voiding the policy under the following clause:

> We do not provide coverage for any insured who has intentionally concealed or misrepresented any material fact or circumstance related to this insurance.

On August 5, 1982, Mrs. Perry sued State Farm in state court to enforce the policy. The case was removed to the United States District Court for the Middle District of Georgia. At trial, State Farm at-

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[1] Jimmy Perry filed a similar statement claiming the other one-half of the dwelling proceeds and $1,471.82 for personal property destroyed in the fire. His claim was paid in full and is not at issue in this case.

tempted to prove that Mrs. Perry had burned her home because she was financially desperate. State Farm introduced evidence that Mrs. Perry had received notice in October, 1981, three months before the fire, that her only source of income, her Social Security benefits, was being cut off. State Farm also introduced evidence that Mrs. Perry had received a notice of foreclosure on her home ten days before the fire. State Farm attempted to show that the house was in poor condition and worth less than half its insured value, but the district court excluded this evidence in the form in which it was offered.

State Farm also attempted to establish that Mrs. Perry had tried to hide her motive for arson by making material representations on March 5 and April 26, including misstatements about her income, the notice of foreclosure, and attempts to sell her house. The trial judge ruled evidence of these misrepresentations inadmissible, but did allow evidence of three alleged misrepresentations on the Sworn Proof of Loss.

At the conclusion of the trial, the jury found that Mrs. Perry had not caused the burning of the house, had not misrepresented material facts, and was entitled to a recovery of $33,910. The district court thereafter entered a slightly reduced judgment for the plaintiff in the amount of $33,108.54 plus interest and costs.

In this appeal, State Farm argues that the district court erred: 1) in excluding evidence of several of the alleged misrepresentations; 2) in excluding evidence of the condition of the house on the issue of motive for arson; and 3) in denying State Farm's motion to procure testimony from the Social Security Administra-

tion about the official termination date of Mrs. Perry's Social Security benefits.

II. EVIDENCE OF MISREPRESENTATIONS

State Farm argues that the trial court improperly excluded evidence of several material misrepresentations from the jury's consideration.

Under a misrepresentation clause, a willful and intentional misrepresentation of material facts made for the purpose of defrauding the insurer will void the contract. *American Alliance Insurance Co. v. Pyle*, 8 S.E.2d 154, 160, 62 Ga.App. 156 (1940). A misrepresentation is material if it "might affect [the insurer's] action in respect to . . . settlement or adjustment of the claim of the insured." *American Alliance Insurance Co. v. Pyle*, 8 S.E.2d at 160. However, the insurer need not actually rely on the representation or suffer any prejudice therefrom. *See Pittman v. American Mutual Fire Insurance Co.*, 199 S.E.2d 893, 129 Ga.App. 399 (1973).

Whether a misrepresentation is material is a jury question, unless the evidence excludes every reasonable inference except that there was or was not a material misrepresentation. *United Family Life Insurance Co. v. Shirley*, 248 S.E.2d 635, 636, 242 Ga. 235 (1978). In this case, the trial court excluded evidence of the following alleged misrepresentations from the jury's consideration, thus finding implicitly that no reasonable jury could have found material misrepresentations on the basis of the proffered evidence.

A. *Offer to Buy the House*

In her March 5, 1982 statement, Perry told State Farm that she had a buyer, Sammy Macomson, for her house. When asked whether Macomson had made a firm offer, she said yes. On April 26 she again told State Farm that Macomson wanted to buy her house. At trial, State Farm argued that these were misrepresentations because Macomson had never made a firm offer for the house. State Farm acknowledged that Macomson had discussed buying the house with Perry, but wanted to introduce Macomson to testify that he would have been willing to buy the house only at a price that was less than half its insured value.

The trial court found that because Macomson had discussed buying the house, there was no material misrepresentation. We agree. No reasonable jury could have found that Perry's responses to questions about the efforts to sell her house were false. Her statement that she had a buyer for the house were true. If Mrs. Perry's response that she had a "firm offer" was not technically accurate, the fault lies with State Farm for failing to explain exactly what the term meant and to ask her the price at which the offer had been made.

B. *Notice of Foreclosure*

On March 5, Perry was asked whether she had ever received a notice of foreclosure. She said no. On April 26, she was asked whether her bank had ever threatened foreclosure. She responded that "over a month" before the fire the bank had written her that "they were going to have to foreclose" on the house. In fact, Mrs. Perry received a letter from the bank ten days before the fire stating that the bank was acceler-

ating her payments and that if she did not pay off her mortgage, it was going to foreclose.

The trial court found no misrepresentation because Mrs. Perry told State Farm about the bank's letter. It ruled immaterial the discrepancy over the actual date of the letter's receipt.

We agree that Perry's statement that she received the letter over a month, not ten days, before the fire could not be a material misrepresentation. The material point was not the date of the notice but the fact of its receipt.

Nor do we think a reasonable jury could find that Mrs. Perry's answer on March 5 was an intentional misrepresentation. Perry drew a distinction between a notice of foreclosure and a letter of acceleration, as demonstrated by her testimony at trial.

> Q. Did you ever receive a notice of foreclosure of that house, Mrs. Perry?
> A. No. sir.
> Q. You never did?
> A. No. sir. I received a letter stating they were going to foreclose unless I paid the payments.

It is therefore clear that Perry thought she was answering accurately on March 5 and that any inaccuracy was caused by State Farm's failure to define a notice of foreclosure or to ask follow-up questions about any other letters relating to foreclosure.

C. *The Condition of the House*

On April 26, Perry told State Farm that her house was in fine condition and needed no repairs. At trial,

State Farm sought to introduce Perry's testimony from her divorce settlement proceeding four months before the fire that the house "needs paint, the front door has a hole in it, the screen is falling off, the carport has never been finished," the doors will not fasten, and the house is "probably" worth only $25,000. The trial court excluded the evidence on the issue of misrepresentation, because the value of the house was set by the inflation clause of the insurance policy and was therefore not an issue in the case.

The condition of the house and its value were clearly relevant to the issue of motive for arson. If the house was in fact in terrible condition, a statement that it was in fine condition and needed no repairs could be a material misrepresentation because it might falsely obscure a motion for arson, thus frustrating the insurer's investigation. However, we do not think a reasonable jury could find the proffered divorce testimony so at odds with Perry's general statements that the house was in fine condition and needed no repairs that the latter was a willful misrepresentation intended to deceive.

The repairs mentioned at the divorce trial were fairly minor. Moreover, it was not shown that the house at the time of the fire was in the same condition as it was during the divorce hearing. As for the divorce testimony that the house was "probably" worth $25,000, Perry qualified that estimate by admitting that she really did not "have any idea" of the house's value. It would be unreasonable to conclude that this statement converted her general testimony that the house was in fine condition into an intentional misrepresentation.

D. *Refinancing the House*

On Apirl 26, Perry told State Farm that she could have financed the house with the Federal Land Bank. At trial, State Farm wanted to submit this to the jury as a misrepresentation, arguing that her house was under foreclosure and consequently could not have been refinanced. Whether the statement about refinancing was a material misrepresentation relevant to motive for arson might have been a jury question had Perry attempted to hide the fact that the house was under foreclosure. However, her statement about refinancing immediately followed her admission that her bank was about to foreclose. Moreover, the statement that she could finance it was made only in connection with her statement that she tried to buy it from her husband and had nothing to do with giving a valuation of the property. There was no evidence that she could not have refinanced for enough to buy her husband's half interest in the house. Given this fact, the claim of alleged misrepresentation is frivolous.

E. *Social Security Cut-Off*

Perry's sole source of income prior to the fire was her Social Security benefits. On April 26, Perry testified that her benefits were cut off in March, two months after the fire, but that the Social Security Administration had "started back in September [four months before the fire] telling me they was cutting it off." Although Mrs. Perry's benefits were officially terminated in December, she continued to receive Social Security checks through February because of a bureaucratic error. Thus, her statement that she was cut off in March was truthful because that was the first month she did not receive a payment.

F. *Phone Bill*

On April 26, Mrs. Perry told State Farm that her phone bill was current at the time of the fire and the months before. At trial, Perry testified that her phone bill had been cut off once in the months before the fire because she failed to pay the bill on time, but had been turned back on when she paid the bill. The court disallowed this evidence on the issue of material misrepresentation.

Although Perry's initial response was not entirely accurate, we do not think a reasonable jury could conclude that it was a willful misstatement about a material fact made for the purpose of defrauding the insurer.

G. *Gas and Grocery Expenses*

On April 26, Perry told State Farm that she did not know how much she spent on groceries and gasoline. At trial, State Farm proffered as proof of a misrepresentation an expense list submitted by Perry to the divorce court several months before the fire. The district court found that Perry's inability to estimate her expenses was not a material misrepresentation. We do not think a reasonable jury could conclude otherwise, particularly since it was Perry's divorce lawyer who actually prepared the list of expenses proffered by State Farm.

III. EVIDENCE OF THE CONDITION OF THE HOUSE

State Farm argues that the divorce testimony relating to the condition and value of the house, discussed *supra*, should have been admitted to impeach

Perry's trial testimony that her house was in "perfect condition" at the time of the fire. State Farm also argues that the divorce testimony was relevant to the issue of Perry's motive to burn the house because it evidenced her belief that the house was worth $25,000, only half its insured value.

The trial court ruled the testimony inadmissible for impeachment purposes because in its opinion, the divorce testimony did not contradict the trial testimony; the court ruled the testimony inadmissible on the issue of motive because it was not relevant.

"The admissibility of evidence is within the sound discretion of the district court . . . and even if error is found it must of course rise above the threshold of harmless error." *Wallace v. Ener*, 521 F.2d 215, 222 (5th Cir.1975).[2]

But for the failure of proof that the house was in the same condition as of the time of her divorce testimony, we would think the trial court erred in excluding the divorce testimony for impeachment and on the issue of motive. Testimony that a house needs repairs, however minor, contradicts a statement that a house is in "perfect condition." Also, testimony about a house's condition and value are relevant to a motive for arson. Here, however, there was a burden on the defendant to show that the property as to which Perry was testifying in the divorce trial was in the same condition at the time of the fire, before such earlier testimony

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[2] *In Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

could be considered, either as impeachment or as proof of motivation. The divorce decree had directed that the house be sold and the proceeds divided between husband and wife. There was no proof offered that during the intervening four months it had been neither painted nor repaired. Moreover, we think such error would be harmless. Error in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties. Fed.R.Evid. 103; Fed.R.Civ.P. 61. The burden of demonstrating that substantial rights were affected rests with the party asserting error. *Liner v. J.B. Talley & Co., Inc.*, 618 F.2d 327, 329 (5th Cir.1980). State Farm argues that it was harmed by the exclusion of evidence because the evidence would have affected the outcome of the case.

We find the error harmless because the evidence in question had little probative value. The needed repairs mentioned in the divorce testimony would not have greatly affected the value of the house. The value of $25,000 placed on the house by Perry in that testimony was more a guess than anything else; she also testified that she did not "have any idea" what the house was worth.[3] Under these circumstances, the excluded evidence would not have added appreciable

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[3] We note that the essence of the excluded evidence, mainly that the house was worth only $25,000, was at least suggested to the jury by a question posed to Mrs. Perry and by the closing argument of Perry's attorney. State Farm asked Mrs. Perry: "Isn't it true [at the divorce trial] that . . . you considered the house at the time to be worth about $25,000?" The question went unanswered. It was not stricken by the court.

In his closing argument, Perry's attorney referred to the fact that "Mr. Farnham [State Farm's attorney] was trying to bring out that it was worth $25,000." Perry's attorney went on to argue

weight to the insurer's defense. *See Garcia v. Gloor*, 618 F.2d 264, 271-72 (5th Cir.1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981).

IV. SOCIAL SECURITY TESTIMONY

Before trial, State Farm moved the district court under 5 U.S.C. § 552a(b)(11) (West 1977), to order the Social Security Administration to testify as to when Perry's Social Security benefits were terminated. The district court denied the motion, stating simply that it had a policy against ordering such information to be produced by the Secretary. State Farm argues that this was reversible error because it prejudiced the arson and misrepresentation defenses by preventing State Farm from establishing that Perry's benefits were officially terminated in December, one month before the fire. As noted above, because of a bureaucratic error, Mrs. Perry continued to receive benefits through February.

Under 5 U.S.C.A. § 552a(b), government agencies can release information about individuals only under certain circumstances. Release is allowed when a court of competent jurisdiction so orders. 5 U.S.C.A. § 552a(b)(11) (West 1977). Requests for court orders under § 552a(b)(11) should be evaluated by balancing the need for the disclosure against the potential harm to the subject of the disclosure. *Stiles v. Atlanta Gas Light Co.*, 453 F.Supp. 798 (N.D.Ga.1978); *Christy v. United States*, 68 F.R.D. 375 (N.D.Tex. 1975).

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that even assuming this was true, Mrs. Perry had no motive to burn the house down.

Here, the balance tilts against disclosure because State Farm had no real need for the Social Security Administration's testimony. State Farm could have utilized normal discovery procedures to obtain information about the termination date from plaintiff or plaintiff's counsel, who had represented the plaintiff before the Social Security Administration. Moreover, on cross-examination, State Farm had an opportunity to ask Mrs. Perry when her benefits were officially terminated, but did not do so.[4]

We find that the denial of the request for production of Social Security testimony was not error.

Accordingly, we AFFIRM.

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[4] In any event, State Farm brought out at trial that Perry had received notices in August and October preceding the January fire, that her benefits were being cut off. This was as probative on the issue of motive as the fact that the benefits were officially cut off in December.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JUNE T. PERRY, Plaintiff-Appellee, vs. STATE FARM FIRE & CASUALTY COMPANY, Defendant-Appellant.	* * * * * * * * * *	CASE NO. 83-8048

Appeal from the United States District Court for the Middle District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 22, 11 Cir., 1984, ____ F.2d ____).

Before KRAVITCH AND ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PHYLLIS KRAVITCH
UNITED STATES CIRCUIT
JUDGE